

LETTER OPINION
95-L-48

February 27, 1995

Mr. John T. Goff
Cass County State's Attorney
P.O. Box 2806
Fargo, ND 58108-2806

Dear Mr. Goff:

Thank you for your letter asking whether a home rule county ordinance can supersede the membership requirements of state law for a water resource district board and the county planning commission, and whether a home rule county ordinance can supersede special assessment initiation and protest procedures provided by state law.

The North Dakota Constitution requires the enactment of laws prescribing the enactment and exercise of home rule in counties and cities.

The legislative assembly shall provide by law for the establishment and exercise of home rule in counties and cities. No home rule charter shall become operative in any county or city until submitted to the electors thereof and approved by a majority of those voting thereon. In granting home rule powers to cities, the legislative assembly shall not be restricted by city debt limitations contained in this constitution.

N.D. Const. art. VII, ? 6. County home rule is provided in N.D.C.C. ch. 11-09.1. If included in a charter, and implemented by ordinance, a home rule county may exercise the powers contained in N.D.C.C. ? 11-09.1-05. Those powers include:

2. Control its finances and fiscal affairs; appropriate money for its purposes, and make payments of its debts and expenses; subject to the limitations of this section levy and collect property taxes, sales taxes, motor vehicle fuels and special fuels taxes, motor vehicle

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registration fees, and special assessments for benefits conferred, for its public and proprietary functions, activities, operations, undertakings, and improvements; contract debts, borrow money, issue bonds, warrants, and other evidences of indebtedness; establish charges for any county or other services to the extent authorized by state law, and establish debt and mill levy limitations; provided, that all property in order to be subject to the assessment provisions of this subsection must be assessed in a uniform manner as prescribed by the state board of equalization and the state supervisor of assessments. A charter or ordinance or act of a governing body of a home rule county may not supersede any state law which determines what property or acts are subject to, or exempt from, ad valorem or sales and use taxes.

3. Provide for county elected and appointed officers and employees, their selection, powers, duties, qualifications, and compensation, and the terms of county appointed officers and employees. However, after adoption of a home rule charter a county elected office may not be eliminated or combined with another office except upon approval of a majority of the electors of the county voting upon the question at a primary or general election or pursuant to the county officer combination, separation, or redesignation procedures of chapter 11-10.2. A home rule charter may not diminish the term of office for which a current county officer was elected, redesignate that elected office during that term as appointed, or reduce the salary of the office for that term.
7. Provide for zoning, planning, and subdivision of public or private property within the county limits but outside the zoning authority of any city or organized township.

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N.D.C.C. ? 11-09.1-05(2), (3), and (7).

N.D.C.C. ? 11-09.1-04 provides, in part:

. . . The charter and the ordinances made pursuant to the charter in county matters must be liberally construed to supersede within the territorial limits and jurisdiction of the county any conflicting state law except for any state law as it applies to cities or any power of a city to govern its own affairs, without the consent of the governing body of the city. . . .

N.D.C.C. ? 11-09.1-05 also provides, in part:

The people of all counties coming within this chapter have the full right of self-government in all matters within the powers enumerated in this chapter. The statutes of this state, so far as applicable, continue to apply to counties, except as superseded by the charters of the counties or by ordinances passed pursuant to the charters.

Home rule counties have only the powers provided by law, and home rule county charters and ordinances supersede state law only with reference to the powers granted by law to home rule counties. See Litten v. City of Fargo, 294 N.W.2d 628 (N.D. 1980).

Because a water resource district is a political subdivision separate from a county, your question concerning membership requirements of a water resource district board has been previously answered by this office in the negative. Letter from Attorney General Heidi Heitkamp to State's Attorney Earle R. Myers, Jr. (July 15, 1993) (copy enclosed).

However, a county planning commission presents a different question. As discussed in the above-noted Attorney General's opinion to State's Attorney Myers, one of the enumerated powers of home rule counties is to provide for county appointed officers, their selection, powers, duties, qualifications, and compensation. See, e.g., 1992 N.D. Op. Att'y Gen. 45, 46 (state laws concerning the selection of county superintendents of schools may be superseded by home rule counties). N.D.C.C. ? 11-33-04 provides for a county planning commission to be selected by the county commission. The county planning commission advises the board of county commissioners on zoning matters, has jurisdiction within the county, and is not itself a governmental agency or body

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politic. N.D.C.C. ch. 11-33 reserves zoning decisions to the board of county commissioners. Thus, county planning commission members are county officers, not the governing board of a separate political subdivision and a home rule county may provide for the selection of county officers. See N.D.C.C. ? 11-09.1-05(3). It is therefore my opinion that if a home rule county charter includes the authority, and that authority has been implemented in an ordinance, a home rule county may determine membership requirements for the county planning commission by the adoption of an ordinance, and that a home rule charter and ordinance will supersede state law in conflict therewith.

A home rule county may, if authority is contained in its charter and implemented by ordinance, "levy and collect . . . special assessments for benefits conferred, for its public and proprietary functions, activities, operations, undertakings, and improvements" N.D.C.C. ? 11-09.1-05(2).

In 1989, this office was asked:

Could a county home rule charter authorize the establishment of special assessments for ordinary county functions and services, such as the creation of special assessment districts for highway improvements?

In response thereto, the Attorney General determined:

Yes The relevant portion of N.D.C.C. ? 11-09.1-05, which addresses . . . [this issue], states as follows:

[S]ubject to the limitations of this section [a home rule county may] levy and collect property taxes, sales taxes, motor vehicle fuels and special fuels taxes, motor vehicle registration fees, and special assessments for benefits conferred, for its public and proprietary functions, activities, operations, undertakings, and improvements . . . and establish debt and mill levy limitations.

N.D.C.C. ? 11-09.1-05(2). This provision allows a county home rule charter to determine the method by which county functions and services are financed. The home rule charter may address separate levies or one general levy and may address any requirement for

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voter approval. The amount of debt and mill levy is left to the county's determination as provided by the home rule charter and ordinances.

This statutory provision states that it is subject to the "limitations of this section." There are only two such limitations. First, all property must be assessed in a uniform manner as prescribed by the State Board of Equalization and the State Supervisor of Assessments. Second, a charter, ordinance, or act of a governing body of a home rule county may not supersede any state law that determines what property or acts are subject to or exempt from ad valorem or sales and use taxes. N.D.C.C. ? 11-09.1-05(2). Beyond these statutory restrictions, the only restrictions applicable would be those contained within the home rule charter and ordinance.

Letter from Attorney General Nicholas J. Spaeth to Lieutenant Governor Lloyd B. Omdahl (August 16, 1989) (copy enclosed).

It is therefore my opinion that, other than the two tax levy and collection restrictions in N.D.C.C. ? 11-09.1-05(2), a home rule county may create special assessment districts and impose assessments thereunder for improvements. This may be done only according to authority contained in the home rule county charter and pursuant to an ordinance enacted to implement the charter authority. It is important that the ordinance be sufficiently detailed. See 1993 N.D. Op. Att'y Gen. 40, 42 (copy enclosed). If the authority is properly reserved and implemented, the county home rule ordinance will supersede state law in conflict therewith, including the sixty percent landowner petition requirements of N.D.C.C. ? 11-11-55.1 and the majority protest bar in N.D.C.C. ? 40-22-18.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

rel/pg
Enclosures